

**BUSINESS REGISTRATION DIVISION
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
STATE OF HAWAII**

In the Matter of:	)	Case No. SEU-2004-006
)	
	)	COMMISSIONER'S FINAL
MARIA P. ABELLO and	)	ORDER AS TO RESPONDENTS
TEANCUM, INC.,	)	MARIA P. ABELLO and
	)	TEANCUM, INC.
Respondents.)	
_____)	

**COMMISSIONER'S FINAL ORDER AS TO
RESPONDENTS MARIA P. ABELLO and TEANCUM, INC.**

On April 12, 2011, the duly appointed Hearings Officer submitted her Findings of Fact, Conclusions of Law and Recommended Order (the "recommended decision") in the above-captioned matter to the parties.

On April 27, 2011, Maria P. Abello ("Respondent Abello") and Teancum, Inc. (together with Respondent Abello, the "Respondents") and the Securities Enforcement Branch of the Business Registration Division, Department of Commerce and Consumer Affairs, State of Hawaii ("Petitioner") filed written exceptions to the Hearings Officer's recommended decision. On May 11, 2011, Petitioner filed a Statement in Support of Part of the Hearings Officer's Recommended Decision and Order and a response to Respondents' written exceptions. On May 12, 2011, Respondents filed a statement in support of the Hearings Officer's recommended decision. Oral arguments were not requested.

DEPT. OF COMMERCE
AND CONSUMER AFFAIRS
2012 MAR -1 P 12:19
HEARINGS OFFICE

Upon review of the entire record of this proceeding, including the exceptions and statements in support, the Commissioner of Securities ("Commissioner") affirms the Hearings Officer's recommended decision in part and reverses in part. The Commissioner affirms the Hearings Officer's recommended decision in part in finding and concluding that Respondents violated Hawaii Revised Statutes (HRS) §§ 485-8, 485-14, 485-25(a)(2) and 485-25(a)(3) (HRS Chapter 485, the "Act"). The Commissioner reverses the Hearings Officer's recommended decision in part and finds and concludes that Respondent Abello violated HRS § 485-25(a)(1).

Facts

In 2003, Respondent Abello agreed to lead the development of a project presented to her by her brother-in-law Kyle Kopitke ("Kopitke"). Respondent Abello was to raise funds for and develop the National Korean War Museum in Oahu, Hawaii (the "museum project") and in the event she raised the funds, Kopitke would pay her \$2.5 million in monthly installments of \$300,000 beginning in October 2003. The federal government was purportedly providing the \$2.5 million in the form of grants. Respondent Abello incorporated a for-profit corporation called Teancum, Inc. on July 2, 2003. Beginning in June 2003, Respondents solicited investors to invest in the museum project through promissory notes with a promised rate of return of 30% to 50% interest and with the return of principle within three to six months. Respondents told investors their money would be used for the development of the National Korean War Museum to honor war veterans, and they told investors that their money would be secure because the National Korean War Museum would be backed by the federal

government. They told investors about the \$2.5 million grant to be paid to Respondents and they told one investor that he would be a partner in a care home that was purportedly going to be built around the perimeter of the museum. It was clear that investors believed that as long as Respondents did well in the museum project, the investors would get their money back with the promised interest. It was also clear Respondent Abello believed if she raised enough funds, she would be compensated well for her efforts.

Most of the investors that Respondents approached were friends and acquaintances of Respondent Abello. She approached friends she described as “poor,” “elderly” and “trusting,” and she gave them materials on the National Korean War Museum and emphasized that the museum project was a secure investment because the museum itself was federally backed. She was able to raise well over \$342,000, possibly up to \$446,000.

In reality, the National Korean War Museum was not backed by the federal government. There was no care home and there was no \$2.5 million grant. The investments were not safe or secure, and Respondents did not make payments of interest of 30% or higher. In addition, the investment contracts were not registered with the State as securities and the Respondents were not registered as salespersons or dealers with the State, none of which was told to investors.

In response to complaints against Respondents in this matter, Respondent Abello said she was merely following directions of Kopitke and was, therefore, not

responsible for the losses incurred by her inducement of investors: she was just passing along the information provided by Kopitke.

The evidence revealed, however, that Respondent Abello was president and incorporator of Respondent Teancum, the corporate entity responsible for the museum project. The evidence also showed that Respondent Abello had sole and full control of all the investors' money. She deposited investors' money into her personal account rather than the corporate account, used some portion of the investors' money toward the development of the project and used some portion of the money for other items as varied as paying the child support for one of the investors to paying rent, movies and other personal expenses.

In addition, the evidence showed that although Respondent Abello relied on Kopitke, she knew Kopitke to be deceitful before she began raising funds for the museum project. She testified that before she began working on his museum project in 2003, Kopitke falsely reported her to the Insurance Commissioner to get her insurance licensed revoked for insuring dead people. She testified he sent false letters to her employer to get her fired. September 22, 2010 testimony of Maria P. Abello, hearing transcript pp. 209-210. She also testified that he lied about sponsoring her to come to the United States in 1996 because he was on welfare and food stamps and could not have sponsored her at that time. Id. at 213. Despite this history, she nevertheless did not check any of the information he gave her when using that information to convince others to invest. In addition, although Respondent Abello told

the investors of Kopitke, his big plans and his federal grant, she never told investors about Kopitke's false reports, letters and other lies.

In the end, the investors on record did not receive principle or interest on their investments. Some investors lost their life savings, one investor mortgaged his home to invest.

Violations under HRS §§ 485-8, 485-14, and 485-25(a)(2) and (3).

In the recommended decision, based on a preponderance of the evidence, the Hearings Officer found Respondents violated HRS §§ 485-8, 485-14, and 485-25(a)(2) and (3). She found that the promissory notes were investment contracts under the four-prong test established by the Hawaii Supreme Court in State v. Hawaii Market Center, Inc., 52 Haw. 642, 485 P.2d 105 (1971) and therefore, were securities within the definition of the Act. The Hearings Officer also found that the exemptions Respondents claimed were not available. Accordingly, the Hearings Officer concluded that Respondents violated HRS §§ 485-8 and 485-14 for failure to register the securities and failure to register as a salesperson and dealer, respectively.

Furthermore, the Hearings Officer made findings under HRS §§ 485-25(a)(2) and (3) for acts and practices which operate as a fraud on investors, including significant material misrepresentations or omissions to state material facts necessary to make statements not misleading in the light in which they were made. The Hearings Officer found that Respondents made false statements and omissions to the Hawaii investors that were material in that there was "a substantial likelihood that its disclosure would have been considered significant by reasonable investors." These misrepresentations

and omissions included, but were not limited to, the statements about the federal grant, the failure to disclose that Respondent Abello would use the money for personal expenses, the statements about the building of the care home, the promises of high fixed returns, and the failure to disclose that the investments were unregistered securities and the professionals were also unregistered with the state. Accordingly, the Hearings Officer found that Respondents violated HRS §§ 485-25(a)(2) and (3).

The Commissioner agrees but adds one additional key finding of fact: Respondent Abello also failed to disclose that Kopitke had made false claims against her in significant ways before the museum project started. If she had told investors this information while relying on his sales packet, it is clear that it would have been a material piece of information that any reasonable investor would have considered significant. Apart from the one addition to the findings of fact set forth above, the Commissioner agrees and affirms the Hearings Officer's recommended decision that Respondents violated HRS §§ 485-8, 485-14, and 485-25(a)(2) and (3).

Violations under HRS § 485-25(a)(1)

Turning to HRS § 485-25(a)(1), the Hearings Officer found that the Petitioners did not prove by a preponderance of the evidence that Respondents violated HRS § 485-25(a)(1). The Hearings Officer looked to the approach in American Savings Bank, F.S.B. v. UBS PaineWebber, Inc., 250 F. Supp.2d 1254 (D.Hawaii 2003) to determine that scienter is required for a finding of fraud under HRS § 485-25(a)(1). The Hearings Officer noted that "HRS § 485-25 is a fraud statute which, consistent with the

federal securities fraud statute, includes a scienter requirement.” American Savings Bank, F.S.B., 250 F. Supp.2d at 1259.

The Hearings Officer then adopted the standard that the petitioner “has the burden of showing that Abello acted with scienter and made knowingly false representations to lenders.” Hearings Officers recommended decision, p. 2. Based on that standard, the Hearings Officer determined that since “[a]ll representations made by Abello to lenders were based upon representations made to her by Kopitke and as such were made in good faith reliance upon Koptike’s representations,” Respondent Abello did not knowingly make the false statements and therefore, did not have the requisite intent for a violation under HRS § 485-25(a)(1).

The Commissioner finds that the law and the facts of the case support a different conclusion than the Hearings Officer’s recommended decision. The standard of proof for administrative hearings as set forth in HRS § 91-10 states that “[t]he degree or quantum of proof shall be a preponderance of the evidence.”

In relevant part, the Hawaii Uniform Securities Act, HRS § 485-25(a)(1) provides:

§ 485-25 Fraudulent and other prohibited practices. (a)

It is unlawful for any person, in connection with the offer, sale or purchase (whether in a transaction described in section 485-6 or otherwise) of any security (whether or not of a class described in section 485-4), in the State, directly or indirectly:

- (1) To employ any device, scheme, or artifice to defraud;

A violation of HRS § 485-25 requires the element of “scienter,” American Savings Bank, F.S.B., 250 F. Supp.2d at 1259. The Ninth Circuit Court of Appeals has

found that the state of mind for scienter in securities cases includes “reckless disregard” for the truth. See Shad v. Dean Witter Reynolds, 799 F.2d 525, 530 (9th Cir.1986) (“scienter, defined as intent to defraud or reckless disregard...”); see also Securities & Exchange Commission v. Burns, 816 F.2d 471, 474 (9th Cir. 1987) (“[scienter] is satisfied if the defendant acts recklessly in his fraud.”) Furthermore, the courts have found that “proof of scienter is often based on inferences from circumstantial evidence.” Securities & Exchange Commission, 816 F.2d at 474; Shad, 799 F.2d at 530.

In light of the case law, the Hearings Officer’s standard for scienter, that of “[making] knowingly false representations,” is too narrow to apply in this case. It does not comport with the precedent of the Ninth Circuit Court of Appeals that has established the broader standard that scienter for cases involving securities fraud includes “reckless disregard.” Based on that precedent, if the facts of a case, whether by inferences from circumstantial evidence or otherwise, show a finding of a reckless disregard for the truth, then the scienter element for a fraud violation under HRS § 485-25(a)(1) has been satisfied.

Turning to the facts of the case, there appears to be, by a preponderance of the evidence, enough facts to support a finding of reckless disregard of the truth. In the recommended decision, the Hearings Officer recognized and Respondent Abello testified that she did not know whether the museum project for which she solicited investors actually was backed by the federal government nor did she know the truth of any of the facts surrounding the National Korean War Museum. She testified Kopitke

hired her to do the solicitations, agreed to pay her \$2.5 million, told her that the National Korean War Museum was federally-backed and gave her materials which she used to attract investors. Respondent Abello testified that she never checked any of the information because she trusted Kopitke. September 22, 2010 testimony of Maria P. Abello, hearing transcript pp. 164, 204. She claimed all she did was pass out Kopitke's information to others in her attempt to get them to invest. Id. The Hearings Officer in the recommended decision agreed with Respondent Abello.

That finding, however, is inconsistent with witnesses who testified that Respondent Abello actively and verbally reinforced the fiction of a secure investment that had the backing of the federal government, September 22, 2010 testimony of Editha Tapeç, hearing transcript p. 27; September 22, 2010 testimony of Rosita Calip, hearing transcript p. 60; and witness after witness testified that they chose to invest based on representations that the museum project was federally backed. September 22, 2010 testimony of Editha Tapeç, hearing transcript p. 27; September 22, 2010 testimony of Michael Parma, hearing transcript p. 47; September 22, 2010 testimony of Rosita Calip, hearing transcript p. 60; September 22, 2010 testimony of Maria P. Abello, hearing transcript p. at 209.

Moreover, what seems to put this matter in an even less favorable light for Respondent Abello was that Respondent Abello knew of Kopitke's deceitful past before she solicited investors on his behalf. In early 2003, before the museum project was underway, he falsely reported her to the Insurance Commissioner to get her insurance licensed revoked for insuring dead people. He sent false letters to her employer to

get her fired. September 22, 2010 testimony of Maria P. Abello, hearing transcript pp. 209-210. He even lied about sponsoring her to come to the United States in 1996. She knew he was on welfare and food stamps at that time. Id. at 213. In trying to distance herself from Kopitke, Respondent Abello at one point testified she did not know her brother-in-law well, id. at pp. 204-205, but the evidence shows she knew him well enough to know he was deceitful.

Despite this history, she agreed to manage Kopitke's project and promote it, relying on nothing but his word, to bring in investors, some of whom she herself described as "poor," "elderly" and "trusting." Id. at pp. 153 (trusting), 167 (poor and elderly). Moreover, she did not feel any need to disclose Kopitke's troubling past conduct to the investors. Respondent Abello's motivation to promote Kopitke and his project appears to have been the promise that Kopitke would pay her \$2.5 million for her efforts and she could keep all profits after expenses. Whatever the true motivation, it was enough to convince her that she should overlook the fact that he had a history of mendacity; that she did not need to share that history with the other investors; and that she did not need to verify any of his facts before using them to induce investors to give her their savings on Kopitke's behalf. It is clear and very unfortunate that Respondent Abello spent a great deal of effort on the museum project and that she herself was betrayed. But she in turn perpetuated a fraud with a reckless disregard for the truth and she harmed many others by doing so.

For the reasons set forth above, the Commissioner reverses the Hearings Officer's recommended decision in part, finds by a preponderance of the evidence the

requisite scienter for a violation under HRS § 485-25(a)(1) and concludes that Respondent Abello violated HRS § 485-25(a)(1).

Based on this conclusion, the Commissioner adds a \$50,000 penalty for violations under HRS § 485-25(a)(1) to the Hearings Officer's recommended penalty of \$10,000 for a total penalty of \$60,000.

Order.

For the reasons set forth above, the Commissioner finds and concludes that the preponderance of the evidence established that Respondents violated HRS §§ 485-8, 485-14, and 485-25(a)(1) and (2) and that Respondent Abello violated HRS § 485-25(a)(3) of the Act. The Commissioner sets forth the sanctions as follows. It is hereby ordered that:

(1) Respondents shall cease and desist from making any offer to sell, solicitation to purchase, sale of, and/or transfer of the above-described securities, or any other security, within, to or from the State of Hawaii;

(2) All contracts regarding the purchase or sale of the aforesaid securities by Respondents to any investors identified in this order or any similarly situated investors are hereby rescinded, unless any said investor opts out in the manner provided for below. For all investors who have not chosen to opt out, Respondents, jointly and severally, shall refund to said investors all monies or other compensation paid, plus interest on the amounts of monies or other compensation calculated at the same rate of ten percent (10%) per annum from the date of the investment to the date of the refund payment until finally paid, minus amounts already paid to said investors. This payment

shall be made within thirty (30) days of the date of this final order (the "Final Order").

Proof of said payments to investors who have not elected to opt out shall be provided to the Securities Enforcement Branch within forty-five (45) days of the date of the Final Order. If an investor elects not to rescind the transaction, then the investor must so indicate in writing that the investor has not elected to exercise such right;

(3) Respondents shall be jointly and severally liable to pay the State of Hawaii, Department of Commerce and Consumer Affairs, Business Registration Division an administrative penalty in the sum of sixty thousand and no/100 dollars (\$60,000.00) plus interest on the unpaid balance thereof at the rate of ten percent (10%) per annum from the date of the Final Order until finally paid. Payment of this administrative penalty shall be made by cashier's check or certified check made payable to the "Department of Commerce and Consumer Affairs Compliance Resolution Fund" and received by the Commissioner within thirty (30) days of the date of the Final Order;

(4) Respondents are permanently barred as a securities sales agent, securities broker-dealer, investment adviser or investment adviser representative from the date of the Final Order and from applying for registration in the State of Hawaii as a securities sales agent, securities broker-dealer, investment adviser or investment adviser representative from the date of the Final Order;

(5) Each Respondent shall be subject to a civil penalty of up to fifty thousand and no/100 dollars (\$50,000.00) for each violation, if Respondent knowingly violates any order of the Commissioner, pursuant to HRS § 485A-604;

(6) The imposition of the Final Order shall not preclude or prevent in any way the imposition of further sanctions or other actions against Respondents or any other party for violations of the Act or HRS Chapter 485A.

Dated: Honolulu, Hawaii

February 29, 2012

Tung Chan

TUNG CHAN
Commissioner of Securities
State of Hawaii



DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

2011 APR 12 A 10: 09

HEARINGS OFFICE

BUSINESS REGISTRATION DIVISION
OFFICE OF ADMINISTRATIVE HEARINGS
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
STATE OF HAWAII

In the Matter of	)	SEU 2004-006
)	
MARIA P. ABELLO and TEANCUM,	)	HEARINGS OFFICER'S FINDINGS OF
INC.,	)	FACT, CONCLUSIONS OF LAW AND
	)	RECOMMENDED ORDER; APPENDICES
Respondents.	)	"A" and "B"
)	
)	
)	

HEARINGS OFFICER'S FINDINGS OF FACT,
CONCLUSIONS OF LAW AND RECOMMENDED ORDER

I. INTRODUCTION

On January 4, 2010, the Commissioner of Securities, Department of Commerce and Consumer Affairs issued a Preliminary Order to Cease and Desist and Notice of Right to Hearing against Maria P. Abello and Teancum, Inc. ("Respondents").

The Office of Administrative Hearings received Respondents' request for hearing on February 1, 2010. The matter was set for hearing and the Notice of Hearing and Pre-Hearing Conference was transmitted to the parties.

At the pre-hearing conference held on February 9, 2010, the parties agreed that the hearing would be rescheduled from February 16, 2010 to May 19, 20 and 21, 2010.

On April 20, 2010, Respondents filed a Motion to Vacate 'Preliminary Order to Cease and Desist' dated January 4, 2010 and for Dismissal ("Motion"). The Motion was scheduled for hearing on May 5, 2010. On May 4, 2010, the Securities Enforcement Branch, Business Registration Division, Department of Commerce and Consumer Affairs ("Petitioner") filed a memorandum in opposition to the Motion.

On May 5, 2010, Petitioner filed a Notice of Motion and Motion for Continuance of Hearing.

On May 5, 2010, oral arguments were heard on Respondents' Motion. Petitioner was represented by Rebecca E. Quinn, Esq. and Respondents were represented by Christopher A. Dias, Esq. The matter was taken under advisement. On May 11, 2010, the Hearings Officer issued an order denying Respondents' Motion.

At a status conference on May 12, 2010, and attended by Mr. Dias and Ms. Quinn, Mr. Dias indicated that Respondents had no objection to Petitioner's Motion to Continue the Hearing. Accordingly, on May 13, 2010, the Hearings Officer issued an order granting Petitioner's Motion and the hearing was reset for September 22 and 23, 2010.

On September 22, 2010, the hearing was convened by the undersigned Hearings Officer. Petitioner was represented by Ms. Quinn and Respondents were represented by Mr. Dias. At the close of the hearing, the parties agreed to file written closing arguments. Petitioner filed its written closing arguments on October 14, 2010. Respondents filed their written closing arguments on October 28, 2010. Petitioner filed its rebuttal argument on November 8, 2010. Petitioner filed its proposed Findings of Fact, Conclusions of Law and Recommended Decision on November 18, 2010 and it is attached hereto and incorporated herein by reference as Appendix "A". Respondents filed their proposed Findings of Fact and Conclusions of Law on November 22, 2010 and it is attached hereto and incorporated herein by reference as Appendix "B".

Having reviewed and considered the evidence and arguments presented at the hearing, together with the entire record of this proceeding, the Hearings Officer hereby renders the following findings of fact, conclusions of law and recommended order.

II. FINDINGS OF FACT

The Hearings Officer adopts the Findings of Fact as provided in Appendices "A" and "B".

III. CONCLUSIONS OF LAW

The Hearings Officer finds and concludes that promissory notes signed by Respondent Abello were investment contracts under HRS § 485-8 and accordingly adopts the Conclusions of Law as provided in Appendix "A", Sections III A, B and C. Since the promissory notes have been found to be investment contracts, the Hearings Officer concludes

that Respondents violated HRS § 485-14 by not being registered as a securities salesperson or dealer or appropriately exempted prior to offering and executing the promissory notes.

The Hearings Officer finds and concludes that Petitioner failed to prove by a preponderance of the evidence a violation of HRS § 485-25(a)(1), and accordingly, adopts Conclusions of Law numbers 1-4 as provided in Appendix "B".

The Hearings Officer finds and concludes that Petitioner proved by a preponderance of the evidence violations of HRS §§ 485-25(a)(2) and 485-25(a)(3) and accordingly, adopts the Conclusions of Law as provided in Appendix "A", section III C(3) as it relates to HRS §§ 485-25(a)(2) and 485-25(a)(3).


IV. RECOMMENDED ORDER

Based on the foregoing, the Hearings Officer recommends that the Commissioner of Securities finds and concludes that Respondent violated Hawai'i Revised Statutes §§ 485-8, 485-14, 485-25(a)(2) and 485-25(a)(3) and recommends that the charge that Respondents violated HRS § 485-25(a)(1) be dismissed.

For the violations found, the Hearings Officer recommends that the January 4, 2010, Preliminary Order to Cease and Desist be modified and the administrative penalty in the sum of \$350,000.00 be reduced to \$10,000.00.

The recommendation to reduce the administrative penalty is being made because the evidence presented did not support a finding that Respondent Abello acted with a reckless disregard for the truth or that Respondents profited substantially from this venture as it appears that most, if not all of the money obtained from the investors was used for the museum project. Accordingly, the Hearings Officer finds that a \$10,000.00 fine provides a just sanction as it is substantial enough to serve as a deterrent and adequately reflects the seriousness of the violations.

DATED: Honolulu, Hawaii, APR 12 2011


SHERYL LEE A. NAGATA
Administrative Hearings Officer
Department of Commerce
and Consumer Affairs

Rebecca E. Quinn 8663
Department of Commerce and
Consumer Affairs
Securities Enforcement Branch
State of Hawaii
335 Merchant Street, Suite 205
Honolulu, Hawaii 96813
Telephone: (808) 586-2740
Facsimile: (808) 586-3977

Attorney for Petitioner
State of Hawaii

DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

2010 NOV 18 P 3:21

HEARINGS OFFICE

**BUSINESS REGISTRATION DIVISION
OFFICE OF ADMINISTRATIVE HEARINGS
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
STATE OF HAWAII**

In the Matter of:	)	SEU-2004-006
)	
	)	PETITIONERS' PROPOSED
	)	FINDINGS OF FACT, CONCLUSIONS
MARIA P. ABELLO AND TEANCUM, INC.,	)	OF LAW, AND RECOMMENDED
	)	DECISION; CERTIFICATE OF
	)	SERVICE
)	
	)	Hearing Date: September 22, 2010
)	
	)	Place: Honolulu, Hawaii
Respondents.)	
	)	Hearings Officer:
	)	Sheryl Lee A. Nagata

**PETITIONER'S PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW AND RECOMMENDED DECISION**

Pursuant to § 16-201-40 of the Hawaii Administrative Rules (hereinafter "HAR")
and the Order of the Hearings Officer at the conclusion of the hearing in this
matter on September 22, 2010, Petitioner Securities Enforcement Branch, Business

**APPENDIX
"A"**

Registration Division, Department of Commerce and Consumer Affairs, State of Hawaii (hereinafter "Petitioner") submits and proposes the following Findings of Fact, Conclusions of Law and Recommended Decision regarding Respondents MARIA P. ABELLO and TEANCUM, INC.

I. INTRODUCTION

On January 4, 2010, Tung Chan, Commissioner of Securities, Department of Commerce and Consumer Affairs, State of Hawaii (hereinafter "Commissioner") issued a Preliminary Order to Cease and Desist and Notice of Right to Hearing (hereinafter "Order") against Respondents MARIA P. ABELLO (hereinafter "Abello") and TEANCUM, INC. (hereinafter "Teancum" and together with Abello, "Respondents"). By written demand filed on February 1, 2010, the named Respondents, by and through their attorney, Christopher A. Dias, filed a written request for hearing pursuant to the provisions of Hawaii Revised Statutes ("HRS") § 485-18.7. The matter was set for hearing and the notice of hearing and pre-hearing conference was transmitted to the parties.

The hearing in the above-captioned matter was convened by the undersigned Hearings Officer in accordance with HRS chapters 91, 92, and 485 on September 22, 2010. Rebecca E. Quinn, Esq. appeared for Petitioner and Christopher A. Dias, Esq. appeared on behalf of Respondents.

At the close of the hearing, the parties were directed to file written closing arguments. Petitioner filed its argument on October 15, 2010. Respondents filed their closing argument on October 26, 2010. On November 8, 2010, Petitioner filed rebuttal argument in response to Respondents' closing argument. The Hearings Officer also

requested that the parties submit Proposed Findings of Fact, Conclusions of Law and Recommended Decision by November 22, 2010.

Petitioner hereby submits to the Hearings Officer its Proposed Findings of Fact, Conclusions of Law and Recommended Decision along with supporting citations.

II. PROPOSED FINDINGS OF FACT

1. The State of Hawaii, acting through its Office of the Commissioner of Securities, Department of Commerce and Consumer Affairs, State of Hawaii (hereinafter "Office of the Commissioner"), administers and enforces the Hawaii Uniform Securities Act (hereinafter "the Act"), HRS § 485 (hereinafter "chapter 485").

2. At all times material herein, beginning January 4, 2003 and through February 3, 2004, Respondents were residents of the State of Hawaii and engaged in the below described activities or conduct in or from the State of Hawaii. See September 22, 2010 testimony of Maria P. Abello and Leolyn Sugue-Anderson.

3. At all times material herein, beginning January 4, 2003 and through February 3, 2004, Teancum was a Hawaii Corporation with its last known business address at 1920 Ala Moana Boulevard, Honolulu, Hawaii. See Hearing Exhibit 1.

4. At all times material herein, beginning January 4, 2003 and through February 3, 2004, Abello was the president of Teancum. See Hearing Exhibit 1.

5. At all times material herein, beginning January 4, 2003 and through February 3, 2004, Respondents offered and/or sold to Hawaii investors investment contracts (hereinafter "Museum Investment Contracts") which they represented were for

the development of the National Korean War Museum (hereinafter "NKWM"). See testimony of Maria P. Abello, Leolyn Sugue-Anderson, Edith Tapeç, Rosita Calip, Michael Pama, and Vicente Ragasa.

6. At all times material herein, beginning January 4, 2003 and through February 3, 2004, the Museum Investment Contracts sold by Respondents were administered under the direction and control of Respondents. See testimony of Maria P. Abello, Leolyn Sugue-Anderson, Edith Tapeç, Rosita Calip, Michael Pama, and Vicente Ragasa.

7. At all times material herein, beginning January 4, 2003 and through February 3, 2004, Respondents obtained checks directly or indirectly from the Hawaii investors who purchased the Museum Investment Contracts. See testimony of Maria P. Abello, Leolyn Sugue-Anderson, Edith Tapeç, Rosita Calip, Michael Pama, and Vicente Ragasa. See *also* Hearing Exhibits Number 16, 18, and 19.

8. In June 2000, Respondents offered and/or sold one Museum Investment Contract or "security" as defined under HRS § 485-1(13) and *Hawaii Market Center* to Hawaii resident Edith Tapeç ("Tapeç"). See testimony of Maria P. Abello, Edith Tapeç, and Leolyn Sugue-Anderson. See *also* Hearing Exhibit 16.

- a. Tapeç invested \$20,000.00 with Respondents in July 2003 for the purchase of one Museum Investment Contract. *Id.*
- b. Tapeç's initial payment of \$20,000.00 was induced by Abello's promises or representations which gave rise to a reasonable understanding that a valuable benefit of some kind, income or

profits would result from the initial payment's employment through Respondents' efforts. *Id.*

- c. Abello offered Tapeç a return on her investment that was higher than her original investment amount. *Id.*
- d. Tapeç's initial payment was subject to the risks of Respondents' investment scheme and all or some of Tapeç's initial payments were put at risk in the event that Respondents' investment scheme failed or Respondents failed to follow through with her investment scheme. *Id.*
- e. Tapeç had no practical control over the managerial decisions and operations of Respondents' investment scheme. *Id.*

9. In or around August 2003, Respondents offered and/or sold one Museum Investment Contract or "security" as defined under HRS § 485-1(13) and *Hawaii Market Center* to Hawaii resident Rosita Calip ("Calip"). See testimony of Maria P. Abello, Rosita Calip, and Leolyn Sugue-Anderson. See also Exhibit 18.

- a. Calip invested \$20,000.00 with Respondents in August 2003 for the purchase of one Museum Investment Contract. *Id.*
- b. Calip's initial payment of \$20,000.00 was induced by Abello's promises or representations which gave rise to a reasonable understanding that a valuable benefit of some kind, income or profits would result from the initial payment's employment through Respondents' efforts. *Id.*

- c. Abello offered Calip a return on her investment that was higher than her original investment amount. *Id.*
- d. Calip's initial payment was subject to the risks of Respondents' investment scheme and all or some of Calip's initial payments were put at risk in the event that Respondents' investment scheme failed or Respondents failed to follow through with her investment scheme. *Id.*
- e. Calip had no practical control over the managerial decisions and operations of Respondents' investment scheme. *Id.*

10. In or around October 2003, Respondents offered and/or sold three Museum Investment contracts or "securities" as defined under HRS § 485-1(13) and *Hawaii Market Center* to Hawaii resident Michael Pama ("Pama"). See testimony of Maria P. Abello, Michael Pama, and Leolyn Sugue-Anderson. See also Exhibit 19.

- a. Pama invested at least \$275,000.00 with Respondents beginning in June 2003 for the purchase of three Museum Investment Contracts in the amounts of \$7,000.00, \$171,000.00, and \$17,000.00. See September 22, 2010 testimony of Pama, transcript pp. 40 and 46.
- b. Pama is certain that he invested more than \$171,000.00 because he had to sell his home for \$380,000.00 in order to pay off the loans he had obtained to invest in the NKWM. *Id.* at p. 47.
- c. Pama's investment was induced by Abello's promises or representations which gave rise to a reasonable understanding

that a valuable benefit of some kind, income or profits would result from the initial payment's employment through Respondents' efforts. *Id.* at 41.

- d. Abello offered Pama a return on her investment that was higher than his original investment amount. *Id.*
- e. Pama's initial payment was subject to the risks of Respondents' investment scheme and all or some of initial payments were put at risk in the event that Respondents' investment scheme failed or Respondent failed to follow through with her investment scheme. *Id.* at 53-55.
- f. Pama is certain that sixty to seventy percent of the monies he invested were used to purchase the materials for building the NKWM because he helped Abello purchase the materials. Pama does not know what was done with the remainder of the monies. *Id.* at 51.
- g. Although Pama was involved in building the museum, he had no practical control over the managerial decisions and operations of Respondents' investment scheme. *Id.* at 54.

11. In September 2003, Respondents offered and/or sold one Museum Investment Contract or "security" as defined under HRS § 485-1(13) and *Hawaii Market Center* to Hawaii resident Vicente Ragasa ("Ragasa"). See testimony of Maria P. Abello, Vicente Ragasa, Candida Ragasa, and Leolyn Sugue-Anderson. See also Exhibit 16.

- a. Ragasa invested \$100,000.00 with Respondents in September 2003 for the purchase of one Museum Investment Contract. *Id.*
- b. Ragasa's initial payment of \$100,000.00 was induced by Abello's promises or representations which gave rise to a reasonable understanding that a valuable benefit of some kind, income or profits would result from the initial payment's employment through Respondents' efforts. *Id.*
- c. Abello offered Ragasa a return on his investment that was higher than his original investment amount. Abello told Ragasa that the Museum Investment Contract would provide a higher rate of return than the CD where the money was being held. See September 22, 2010 testimony of Vicente Ragasa and Candida Ragasa, hearing transcript pp. 71 and 77.
- d. Respondents' also told Ragasa that he and his wife would be given jobs at the NKWM. See September 22, 2010 testimony of Vicente Ragasa and Candida Ragasa, hearing transcript pp. 72 and 76.
- e. Ragasa's initial payment was subject to the risks of Respondents' investment scheme and all or some of Ragasa's initial payments were put at risk in the event that Respondents' investment scheme failed or Respondents failed to follow through with her investment scheme. *Id.*

- f. Ragasa had no practical control over the managerial decisions and operations of Respondents' investment scheme. *Id.*

12. At all times material herein, beginning January 4, 2003 through February 3, 2004, Respondents' Museum Investment Contracts were not registered with the Commissioner and were not exempt from registration. See testimony of Leolyn Sugue-Anderson. See *a/so* Exhibit 20.

13. From January 4, 2003 through February 3, 2004, Respondents were acting either as an issuer of their own securities or as a securities investment adviser, investment adviser representative, broker dealer, and/or salesperson of the Museum Investment Contracts. See testimony of Leolyn Sugue-Anderson.

14. From January 4, 2003 through February 3, 2004, Respondents were not registered as a securities investment adviser, investment adviser representative, salesperson or dealer of securities with the Commissioner nor were Respondents exempt from registrations.

15. Respondents directly or indirectly made untrue statements of a material fact or omitted to state a material fact necessary in order to make the statements made, in light of circumstances under which they were made, not misleading in connection with the offer, sale or purchase of the Museum Investment Contracts in violation of HRS § 485-25(a)(2):

- a. Abello appealed to Hawaii investors' sense of patriotic pride by telling them that all the investment monies would be used for the development of a museum that would honor Korean War heroes;

- b. Abello told Hawaii investors that a substantial profit would be made for the benefit of Hawaii investors through Respondents' efforts;
- c. Abello told Hawaii investors that they would earn a high rate of return. In particular, she told Investor Ragasa that the investment contract would provide a higher rate of return than the CD in which he held his life savings;
- d. Abello told Hawaii investors that the museum would be funded by the government through a government grant;
- e. Abello told Hawaii investors that their investment was secure because the museum was being subsidized by the federal government and was endorsed by politicians;
- f. In order to induce Pama to invest the entire proceeds of the sale of his home, Abello told him that he would be a partner in a care home that was purportedly going to be built around the perimeter of the museum;
- g. Respondents failed to disclose that the Museum Investment Contracts were "securities" that were required to be registered with the State of Hawaii, Office of the Commissioner of Securities, Department of Commerce and Consumer Affairs, and were not registered or exempt from registration;
- h. Respondents failed to disclose that Respondents were required to be registered to transact securities with the State of Hawaii, Office of the

Commissioner of Securities, Department of Commerce and Consumer Affairs, and were not registered as a securities dealer or salesperson, and were not exempt from registration;

- i. Respondents failed to disclose to Hawaii investors that their investment monies would be placed into Abello's individual checking account at City Bank;
- j. Respondents failed to disclose to Hawaii investors that approximately \$74,536.35 of investor monies would be used to pay Abello's personal expenses; and
- k. Respondent failed to disclose to investor 9 that the bank check comprising his investment monies would be cashed by Abello on the same date the bank check was drawn.

III. PROPOSED CONCLUSIONS OF LAW

A. INVESTMENTS IN RESPONDENTS' MUSEUM INVESTMENT CONTRACTS ARE INVESTMENT CONTRACTS, AND THUS SECURITIES UNDER HAWAII LAW.

The Museum Investment Contracts are investment contracts under HRS § 485-1(13). Investment contracts are by definition securities as defined under the Act.

In the landmark case of *State v. Hawaii Market Center, Inc.* 52 Haw. 642, 485 P.2d 105 (1971), the Hawaii Supreme Court set forth a four-prong test to determine when an investment scheme involved securities or investment contracts and fell within the purview of the Act, HRS § 485. The Hawaii Supreme Court held that an investment contract is created whenever:

1. an offeree furnished initial value to an offeror;
2. a portion of the initial value is subject to the risks of the enterprise;
3. the furnishing of the initial value is induced by the offeror's promises or representations which give rise to a reasonable understanding that a valuable benefit of some kind, over and above the initial value, will accrue to the offeree as a result of the operation of the enterprise; and
4. the offeree does not receive the right to exercise practical and actual control over the managerial decisions of the enterprise.

Id., 52 Haw. at 648-49, 485 P.2d 109.

The Hawaii Supreme Court adopted this broad definition of an investment contract in recognition of the remedial purpose of the state securities laws in preventing fraud and protecting the public against unsubstantial schemes. *Id.* The Court designed this test to protect the public against both "novel forms of investment" as well as more conventional forms of investments, and stated that the formula was to be broadly construed for these purposes. *Id.*

B. INVESTMENTS IN RESPONDENTS' MUSEUM INVESTMENT CONTRACTS ARE INVESTMENT CONTRACTS UNDER THE HAWAII MARKET CENTER FOUR-PRONG TEST AND THEREFORE ARE SECURITIES.

To determine whether or not investments by Hawaii investors in Respondents' Museum Investment Contracts are investment contracts and therefore "securities" as defined in HRS § 485-1(13), it should be emphasized that the laws must be given broad construction for the purpose of protecting the public. See, *Hawaii Market Center*, 52 Haw. at 648. Moreover, in determining whether Respondents' Museum Investment Contracts are "securities," the focus should be on the "economic

realities” of the transaction as opposed to the superficial form of the investment. *Id.* at 647.

In this case, the Museum Investment Contracts signed by Hawaii investors are investment contracts because all the factors delineated by the Hawaii Supreme Court in *State of Hawaii v. Hawaii Market Center*, 52 Haw. 642 (1971) are present. In *Hawaii Market Center*, the Hawaii Supreme Court held that an investment contract is created whenever the following factors were present:

1. An offeree furnishes initial value to an offeror. Here, Hawaii investors invested \$446,000.00 in Teancum;
2. A portion of the initial value is subjected to the risks of the enterprise. Here, Respondents held themselves out as being in the business of providing certain services of land acquisition, fund raising, public relations, accounting, product development, and overall coordination for the general development of the museum. Abello also told investors that she was a successful business woman who would make a profit in developing the museum. The evidence established that any profits that investors hoped to realize were dependent on how successful Respondents were at coordinating the general development of the museum;
3. The furnishing of initial value is induced by the offeror's promises or representations which give rise to a reasonable understanding that a valuable benefit of some kind, over and above the initial value will accrue to the offeree as a result of the operations of the enterprise. According to the evidence, Hawaii investors were induced to invest in the museum

because they were promised a 30% fixed rate of return. Based on established case law, the reference point should be the Hawaii investors' expectations and here the Hawaii investors expected to receive their fixed rate of return within a four month time span. Respondents argue that the inducements in this case were based on fixed returns, rather than outright profits, and therefore the profit sharing element of a security is lacking. However, the Hawaii Supreme Court has held that it is irrelevant that inducements leading an investor to risk initial investment are founded on promises of fixed returns rather than share of profits. *Id.* at 651. The fact that Respondents guaranteed Hawaii investors a fixed rate of return independent of the museum's profits does not undermine the investment nature of the transactions; and

4. The offeree does not receive the right to exercise practical and actual control over the managerial decisions of the enterprise. Here, it was clear from the evidence that the Hawaii investors exercised no control over the managerial decisions of the enterprise.

Petitioner established by a preponderance of the evidence that the Museum Investment Contracts constituted investment contracts and are therefore securities under the Act, Chapter 485. Therefore, the transactions testified to by the Hawaii investors are subject to regulation under the Act.

Respondents contend that the Museum Investment Contracts are exempt from registration requirements under HRS § 485-4(9). HRS § 485-4(9) provides that the following type of security is exempt from §§ 485-4.5, 485-8, and 485-25 (a)(7):

Any security issued by any issuer organized and operated not for private profit but exclusively for religious, educational, benevolent, charitable, fraternal, social, athletic, or reformatory purposes, or as a chamber of commerce or trade or professional association.

Abello organized Teancum as a Domestic Profit Corporation and its registration information admitted as Hearing Exhibit 1 clearly indicates this. In addition, Abello represented that Teancum's business was to provide certain services to the NKWM and individual Hawaii investors understood this to be the case. There is absolutely no evidence that Teancum was meant to be a nonprofit organization. Therefore, HRS § 485-4(9) is inapplicable to this case.

Respondents also contend that the transactions are exempt from registration requirements under HRS § 485-6(9). HRS § 485-6(9) states in relevant part: "Any transaction pursuant to an offer to sell securities of an issuer, is part of an issue which" ... [Emphasis added.] The key language is "offer to sell". Once a security is transacted, an exemption under HRS § 485-6(9) no longer exists. A plain reading of the section supports this position. In addition, this position is further supported when one looks at what qualifies as an exempt transaction under HRS § 485-6(10) which states: "Any offer or sale of a preorganization certificate" ... Clearly, HRS § 485-6(9) could have included qualified exempt transactions covering the sale of securities, however, that is not that state of the law. Therefore, only an **offer to sell** is exempt.

In this case, Respondents completed the sales of eleven (11) securities transactions through Abello to Hawaii investors. Therefore, because the eleven (11)

securities transactions were not merely offers to sell securities but, rather, sales of securities, Respondents' transactions were not exempt under HRS § 485-6(9).

Additionally, HRS § 485-6(9) states that a transaction will be exempt under the following circumstances:

Any transaction pursuant to an offer to sell securities of an issuer, if the transaction is part of an issue which:

- (A) There are no more than twenty-five offerees, wherever located (other than those designated in paragraph (8)) during any twelve consecutive months;
- (B) The issuer reasonably believes that all purchasers, wherever located, (other than those designated in paragraph (8)), are purchasing for investment;
- (C) No commission, discount, or other remuneration is paid or given, directly or indirectly, to a person, other than a dealer or agent registered under this chapter, for soliciting a prospective purchaser in this State; and
- (D) The securities of the issuer are not offered or sold by general solicitation or any general advertisement or other advertising medium. [Emphasis added.]

The focus on whether or not Abello's transactions with the Hawaii investors fall within the purview of HRS § 485-6(9) centers on sub-section (C) above. For Respondents to succeed in their assertion that Abello's transactions with the Hawaii investors are exempt from registration, this statute contemplates that Abello did not take or pay herself one penny as a commission, discount or paid other remuneration, in addition to complying with sub-sections (A), (B) and (D) as well. Based on Abello's bank records, Abello received and kept a substantial portion of the investment monies as either a commission or other remuneration. Therefore, Abello's transactions with the Hawaii investors are not exempt transactions under HRS § 485-6(9).

Finally, to fall within this exempt transaction category, the underlying transaction should be a legitimate securities transaction. Allowing Abello to have any of her securities transactions with the Hawaii investors fall under the purview of HRS § 485-6(9) would run contrary to the remedial purpose of the state securities laws which were set up to prevent fraud and protect the public against unsubstantial schemes. *Hawaii Market Center, supra*, at 648-49, 485 P.2d 109. It would not appear that the legislative intent of enacting chapter 485 ever contemplated providing fraudsters with a “safe harbor” by application of an exempt transaction status under HRS § 485-6(9). To do so would defy logic and defeat the legislative intent underlying securities regulation which is to protect consumers and main street investors from fraud.

C. RESPONDENTS VIOLATED HAWAII SECURITIES LAWS.

1. SECURITIES REGISTRATION VIOLATIONS – HRS § 485-8.

A security must be appropriately registered with the Office of the Commissioner before being offered or sold, unless the security is exempt, pursuant to HRS § 485-8. HRS § 485-8 makes it unlawful for any person to sell or offer any security unless that security has been registered with the Office of the Commissioner or is exempt from registration.

The preponderance of the evidence established that Respondents offered to sell and sold securities to Hawaii investors, from January 4, 2003 through February 3, 2004 through their Museum Investment Contracts. The evidence further established that these securities were not registered with the Office of the Commissioner or appropriately exempt from registration. Therefore, Respondents violated HRS § 485-8.

**2. SALESPERSON AND DEALER REGISTRATION VIOLATIONS –
HRS § 485-14.**

A securities dealer and/or salesperson must be registered with the Office of the Commissioner or appropriately exempt from registration before transacting securities in Hawaii under HRS § 485-14. Said Section makes it unlawful for any person to transact business in Hawaii as a securities dealer or salesperson unless that person has been registered with the Office of the Commissioner.

Respondents' active involvement in the sale of the Museum Investment Contracts through their solicitation and sale, constitutes the transaction of business involving securities in Hawaii. In making offers and sales of the Museum Investment Contracts to Hawaii residents, Respondents acted as securities salespersons or dealers within the meaning of HRS §485-1(2) and (3). According to the evidence, Respondents were not duly registered securities salespersons or dealers. Thus, Respondents violated HRS § 485-14.

**3. AGENCY ENFORCEMENT OF HRS § 485-25(a)(1)
REQUIRES SCIENTER BUT NOT FOR ENFORCEMENT
OF HRS §§ 485-25(a)(2) AND (3).**

The provisions of HRS §§ 485-25(a)(1), (2), and (3) which detail the securities fraud allegations against Respondents mirror the fraud provisions of HRS § 17(a) of the Securities Exchange Act of 1933. Interpretation of Hawaii's codification of securities fraud should be interpreted, where similar, in the same manner as the federal courts and the Securities and Exchange Commission have interpreted the federal counterpart.

The requirement for “scienter” in sub-section (a)(1) of HRS § 485-25 may be satisfied by a showing of a reckless disregard for the truth. It is not necessary to find that a misrepresentation or omission of material fact was made willfully or maliciously in order to conclude that a violation of HRS § 485-25(a)(1) has occurred. Such a violation will be sustained if the misrepresentation or omission was made recklessly. Proof of such recklessness may be based upon inferences from circumstantial evidence. See *Securities & Exchange Commission v. Burns*, 816 F.2d 471 (9th Cir. 1987).

A violation of HRS § 485-25(a)(2) and (a)(3) occurs when there is any untrue statement of a material fact or any omission to state a material fact. A fact is considered material for purposes of Hawaii securities laws “if there is a substantial likelihood that its disclosure would have been considered significant by [a] reasonable investor.” See, e.g., *Basic Inc. v. Levinson*, 485 U.S. 224, 231, 108 S.Ct. 978, 983, 99 L.Ed.2d 194 (1988). See also *T.S.C. Industries, Inc. v. Northway, Inc.*, 425 U.S. 438 (1976). As with §§ 17(a)(2) and (a)(3) of the Securities Exchange Act of 1933, scienter is not required for a violation of HRS §§ 485-25(a)(2) and (3). See, e.g. *Aaron v. Securities & Exchange Commission*, 100 S.Ct. 1945 (1980); *Securities & Exchange Commission v. Murphy*, 626 F.2d 633 (9th Cir. 1980); and *Securities & Exchange Commission v. Blazon Corp.*, 609 F.2d 960, 965 (9th Cir. 1979).

Here, Respondents made numerous false statements and/or omissions to the Hawaii investors, including but not limited to:

- a. Abello appealed to Hawaii investors’ sense of patriotic pride by telling them that all the investment monies would be

used for the development of a museum that would honor Korean War heroes;

- b. Abello told Hawaii investors that a substantial profit would be made for the benefit of Hawaii investors through Respondents' efforts;
- c. Abello told Hawaii investors that they would earn a high rate of return. In particular, she told Investor Ragasa that the investment contract would provide a higher rate of return than the CD in which he held his life savings;
- d. Abello told Hawaii investors that the museum would be funded by the government through a government grant;
- e. Abello told Hawaii investors that their investment was secure because the museum was being subsidized by the federal government and was endorsed by politicians;
- f. In order to induce Pama to invest the entire proceeds of the sale of his home, Abello told him that he would be a partner in a care home that was purportedly going to be built around the perimeter of the museum;
- g. Respondents failed to disclose that the Museum Investment Contracts were "securities" that were required to be registered with the State of Hawaii, Office of the Commissioner of Securities, Department of Commerce and Consumer Affairs, and were not registered or exempt from registration;

- h. Respondents failed to disclose that they were required to be registered to transact securities with the State of Hawaii, Office of the Commissioner of Securities, Department of Commerce and Consumer Affairs, and were not registered as a securities dealer or salesperson, and were not exempt from registration;
- i. Respondents failed to disclose to Hawaii investors that their investment monies would be placed into Abello's individual checking account at City Bank;
- j. Respondents failed to disclose to Hawaii investors that approximately \$74,536.35 of investor monies would be used to pay Abello's personal expenses; and
- k. Respondent failed to disclose to investor 9 that the bank check comprising his investment monies would be cashed by Abello on the same date the bank check was drawn.

The foregoing non-inclusive list of material misrepresentations and omissions establishes that Respondents made numerous untrue statements of material fact and omitted to state material facts necessary to make statements made not misleading, and also engaged in acts and practices which operated as a fraud upon investors, in violation of HRS §§ 485-25(a)(2) and (3).

Respondents employed a device or scheme to defraud investors in Hawaii in the form of their Museum Investment Contracts. Respondents induced investors to invest in the NKWM by promising a 30% rate of return and falsely representing that the

investment monies would be used to further the development of the NKWM. The monies were not entirely invested in the NKWM. Instead, the monies were placed in Abello's individual checking account and a large portion was used to pay for Abello's personal expenses, all without the knowledge of the Hawaii investors. Abello tried to shift the blame to Kyle Kopitke (hereinafter "Kpoitke") by stating that she relied on his representations in good faith. However, even if this were true, Abello testified that Kopitke had fraudulently reported her for insurance fraud approximately three years prior to embarking on the NKWM development and acknowledged that she did not know Kopitke well. Despite her alleged assertions about Kopitke, Abello solicited the Hawaii investors, took their investment monies, deposited those monies into her individual bank account, and relayed the misrepresentations that induced them to invest. Respondents were at the very least reckless in their actions and their actions prove that they employed a scheme to defraud investors. Based on these considerations, Respondents violated HRS §485-25(a)(1).

D. BURDEN OF PROOF IS BY A PREPONDERANCE OF THE EVIDENCE.

The standard of proof for administrative hearings is contained in HRS § 91-10 which states in relevant part that "[t]he degree or quantum of proof shall be a preponderance of the evidence."

E. ADMINISTRATIVE PENALTY OF \$350,000 IS NOT EXCESSIVE.

The principles regarding the imposition of administrative penalties are set forth in *Blake v. State Personnel Board*, 25 Cal.App.3d 541, 553, 102 Cal.Rptr. 50 (1972):

It is settled that the propriety of a penalty imposed by an administrative agency is a matter resting in the sound discretion of the agency and that its decision will not be disturbed unless there has been an abuse

of discretion. Legal discretion means an impartial discretion taking into account all relevant facts, together with legal principles essential to an informed and just decision. The term 'judicial discretion' has been defined as 'an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised *ex gratia*, but a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice.' The fact that reasonable minds may differ as to the propriety of the penalty imposed will fortify the conclusion that the administrative body acted within the area of its discretion.

See also, *Nightingale v. State Personnel Board*, 7 Cal.3d 507, 515, 102 Cal.Rptr. 758, 498 P.2d 1006 (1972). An administrative penalty is excessive only if it is so "disproportionate to the offense as to shock one's sense of fairness." *Schillerstrom v. State*, 180 Ariz. 468, 471, 885 P.2d 156, 159 (1994), *Culpepper v. State*, 187 Ariz. 431, 438, 930 P.2d 508, 515 (1996).

Pursuant to HRS § 485-18.7 an administrative penalty of not more than \$100,000.00 may be assessed for each violation of the Act.

The Commissioner has discretion to assess an administrative penalty up to \$100,000.00 for each violation of the Act. Clearly, the evidence shows that Respondents induced the Hawaii investors, to invest their hard earned dollars. The evidence presented shows violations of chapter 485 that far exceed ten (10) violations or an equivalent of up to a \$1 Million penalty. Assuming arguendo, that a lower administrative penalty of \$10,000.00 per violation is assessed, a finding that Respondents committed securities violations would still result in the assessment of a \$400,000.00 administrative penalty. Therefore, an administrative penalty of \$350,000.00 in this case is not excessive.

PETITIONER'S PROPOSED RECOMMENDED ORDER

For the foregoing reasons, the Hearing Officer should recommend that the Commissioner of Securities find and conclude that Petitioner established by a preponderance of the evidence that Respondents, violated HRS §§ 485-8, 485-14, 485-25(a)(1), (a)(2) and (a)(3) and that the Order issued by the Commissioner on January 4, 2010, and the sanctions assessed therein against Respondents, be affirmed in its entirety.

Dated: Honolulu, Hawaii NOV 18 2010



REBECCA E. QUINN
Attorney for Petitioner
Department of Commerce and Consumer Affairs
STATE OF HAWAII

**STATE OF HAWAII
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS**


In the Matter of:	)	Case No. SEU-2004-006
)	
	)	CERTIFICATE OF SERVICE
MARIA P. ABELLO AND TEANCUM, INC.)	
)	
)	
Respondents.)	
)	
_____)	

CERTIFICATE OF SERVICE

I hereby certify that a filed copy of the forgoing PETITIONER'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED DECISION will be served on the Respondents' attorney, through regular mail at his last known address.

DATED: Honolulu, Hawaii, NOV 18 2010.

CHRISTOPHER A. DIAS, ESQ.
Attorney for Respondents
810 Richards Street, Suite 810
Honolulu, Hawaii 96813



DONNA M. CURRIE
Legal Clerk
Department of Commerce
and Consumer Affairs
State of Hawaii

CHRISTOPHER A. DIAS 6265-0
Clifford Center
810 Richards Street, Suite 810
Honolulu, Hawaii 96813
Telephone: (808)524-4600

DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

2010 NOV 22 A 8:03

HEARINGS OFFICE

Attorneys for Respondents

BUSINESS REGISTRATION DIVISION
OFFICE OF ADMINISTRATIVE HEARINGS
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
STATE OF HAWAII

In the Matter of:	)	Case No. SEU-2004-006
)	
MARIA P. ABELLO and TEANCUM, INC.,	)	RESPONDENTS MARIA P. ABELLO
	)	AND TEANCUM, INC.'S PROPOSED
Respondents.	)	FINDINGS OF FACT AND
	)	CONCLUSIONS OF LAW; CERTIFICATE
	)	OF SERVICE
)	
	)	<u>Hearing:</u>
	)	Date: September 22, 2010
	)	Time: 9:00 a.m.
	)	Hearings Officer: Sheryl Lee A. Nagata
)	

RESPONDENTS MARIA P. ABELLO AND TEANCUM, INC.'S
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

A hearing was held in the above-referenced matter on September 22, 2010 at 9:00 a.m., the Honorable Sheryl Lee A. Nagata presiding. Rebecca E. Quinn, Esq. appeared on behalf of Petitioner Department of Commerce and Consumer Affairs, State of Hawaii ("Petitioner"). Christopher A. Dias, Esq. appeared on behalf Respondents Maria P. Abello ("Abello") and Teancum, Inc. ("Teancum"). Based on the evidence presented during the hearing, the Hearings Officer makes the following Findings of Fact and Conclusions of Law.

I. FINDINGS OF FACT

1. In April 2003, Kyle K. Kopitke ("Kopitke") approached Abello and asked for her

APPENDIX
"B"

assistance with the development and creation of a museum to honor veterans of the Korean War. Kopitke represented to Abello that he was the President of the Board of Trustees of an organization known as The National Korean War Museum (“NKWM”). Transcript of Proceedings (“Tr.”), pp. 152-153; Respondents’ Exhibit 5.

2. Abello was interested in being a part of this worthwhile project, and the discussions between her and Kopitke resulted in a contract dated May 1, 2003 (the “May 1, 2003 Contract”). Tr., p. 156.

3. Under the terms of the May 1, 2003 Contract, Abello was required to “provide land acquisition, fund raising, public relations, accounting, product development and overall coordination for the general development of the National Museum.” Respondents’ Exhibit 4.

4. Under the terms of the May 1, 2003 Contract, Kopitke, as trustee of the NKWM, was required to pay Respondents “\$2.5 million dollars.” Payment of the total contract price was to be made in monthly installments of \$300,000.00 beginning on October 20, 2003. Respondents’ Exhibit 4.

5. After executing the May 1, 2003 Contract, Abello undertook to fulfill her obligations thereunder. In connection with her fund raising efforts, Kopitke prepared and provided to Abello written materials describing the project. Tr., p. 156. These materials represent, inter alia, that the project:

- (a) would be funded in part by government grants;
- (b) was endorsed by various prominent local and national politicians and public figures; and
- (c) that any funds loaned toward development costs would be repaid with a

30% rate of return.

Respondents' Exhibits 1 and 2.

6. As part of her fund raising efforts, Abello relied upon the representations contained in the materials provided by Kopitke and provided these materials to prospective lenders. Tr., pp. 206, 207, 216.

7. Everything Abello told prospective lenders was contained in the materials prepared and provided by Kopitke. Tr., pp. 167-168.

8. Abello borrowed \$342,000.00 from lenders. Cease and Desist Order, p. 3.

9. Each lender was given a promissory note signed by Abello. In each case the promissory notes provided for a 30% return within 3-4 months. Petitioner's Exhibits 16, 18 and 19. Abello made the promises contained in the promissory notes concerning repayment and the timing of repayment in reliance upon Kopitke's payment of the \$2.5 million due under the May 1, 2003 Contract, which was supposed to be paid in \$300,000.00 monthly installments beginning in October 2003. Tr., p. 166.

10. The repayment of principal and interest under the promissory notes was not subject to or conditioned upon the success of the museum. None of the lenders expected any ownership interest in the museum or anything over and above the sums due under their respective promissory notes. Tr., pp. 22, 28, 40, 41, 64, 74.

11. Abello deposited some of the loan proceeds into her personal checking account, both because one of the lenders, a bank employee, recommended that she do so, and because the costs associated with the development of the museum were coming due on a daily basis, and Abello required immediate access to the loan proceeds to pay the museum-related expenses. Tr.,

pp. 170-171, 232-233.

12. In the course of developing the museum Abello incurred museum-related expenses for a variety of types of products and services ranging from land acquisition to utility charges, construction charges, cement, ornamental statues, and flooring materials. Respondents' Exhibit 9.

13. Abello used all of the \$342,000.00 borrowed, plus additional sums of approximately \$20,000.00 of her own funds, for payment of project-related expenses totaling \$362,349.26. Respondents' Exhibit 9; Tr., p. 189.

14. Kopitke failed to pay any of the \$2.5 million he was obligated to pay under the May 1, 2003 Contract. Tr., p. 165. As a result, Abello was unable to repay all of the \$342,000.00 she borrowed, but did repay some of the lenders with her own money. Id.

15. Abello pursued payment from Kopitke but was unsuccessful because she discovered Kopitke had left Hawaii, but did locate Kopitke's whereabouts when she learned of a legal proceeding against him in Nebraska. Tr., pp. 196-197.

16. In that proceeding Kopitke consented to the entry of a decree against him and admitted to numerous violations of the Nebraska Nonprofit Corporation Act, the Uniform Deceptive Trade Practices Act of Nebraska, and the Nebraska Consumer Protection Act arising out of Kopitke's supposed development of a Korean War museum like the one he purported to be developing in Hawaii. Respondents' Exhibit 22.

17. At the request of Kopitke, and not any of the lenders, Petitioner initiated this action on January 4, 2010 alleging various violations of the Hawaii Uniform Securities Act. Tr., p. 128.

II. CONCLUSIONS OF LAW

1. Petitioner alleges that the Respondents have engaged in fraudulent conduct in violation of Hawaii Revised Statutes (“HRS”) §485-25.

2. To prevail on this claim, the Petitioner has the burden of showing that Abello acted with scienter and made knowingly false representations to lenders. American Savings Bank, F.S.B. v. UBS Paine-Webber, Inc., 250 F.Supp.2d 1254, 1259 (D. Hawaii 2003)(“HRS §485-25 is a fraud statute which, consistent with the federal securities fraud statute, includes a scienter requirement”).

3. “Scienter” is defined as “knowledge by the misrepresenting party that material facts have been falsely represented or omitted with an intent to deceive.” *Black’s Law Dictionary*, 6th ed., p. 1345 (1990).

4. All representations made by Abello to the lenders were based upon representations made to her by Kopitke and as such were made in good faith reliance upon Kopitke’s representations. The representations made by Abello were accordingly not made with intent to deceive, and Abello did not engage in fraudulent conduct in violation of HRS §485-25.

5. Petitioner also alleges that the promissory notes were securities as defined by HRS §485-1 but were not registered as securities, and that Abello was not licensed to sell securities, and as such has violated HRS §§485-8 and 14.

6. Under the Hawaii Uniform Securities Act, an investment contract is created whenever:

- (1) an offeree furnishes initial value to an offeror, and
- (2) a portion of the initial value is subject to the risks of the enterprise, and
- (3) the furnishing of the initial value is induced by the offeror’s promises or

representations which give rise to a reasonable understanding that a valuable benefit of some kind, over and above the initial value, will accrue to the offeree as a result of the operation of the enterprise, and

(4) the offeree does not receive the right to exercise practical and actual control over the managerial decisions of the enterprise.

State v. Hawaii Market Center, Inc., 52 Haw. 642, 649 (1971).

7. The promissory notes were stand-alone obligations of the Respondents and as such were not “subject to the risks of the enterprise.”

8. The lenders did not thereby acquire an ownership interest in the museum. They did not stand to make any amount “over and above” the principal and interest described in the promissory notes. The interest due under the promissory notes was not tied to the museum and therefore was not to be repaid “as a result of the operation” of the museum.

9. The promissory notes are therefore not securities. Accordingly, they did not need to be registered as securities, and Abello did not need to be licensed to transact the promissory notes.

10. To the extent the above Findings of Fact should correctly be designated as Conclusions of Law, and vice versa, they shall be so designated.

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearings Officer hereby orders that the Petitioner’s Cease and Desist Order be and hereby is VACATED.

DATED: Honolulu, Hawaii, _____.

SHERYL LEE A. NAGATA
Administrative Hearings Officer
Department of Commerce and Consumer Affairs

BUSINESS REGISTRATION DIVISION
OFFICE OF ADMINISTRATIVE HEARINGS
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
STATE OF HAWAII

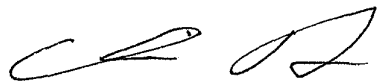
In the Matter of:	)	Case No. SEU-2004-006
)	
MARIA P. ABELLO and TEANCUM, INC.,	)	CERTIFICATE OF SERVICE
)	
Respondents.)	
)	
)	
)	
)	
)	

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a filed copy of the foregoing document will be served by hand
delivery on the party listed below at her last known address on the date herein indicated:

REBECCA E. QUINN, ESQ.
Securities Enforcement Branch
Business Registration Division
Department of Commerce and Consumer Affairs
State of Hawaii
335 Merchant Street, Suite 205
Honolulu, Hawaii 96813

DATED: Honolulu, Hawaii, November 22, 2010.



CHRISTOPHER A. DIAS
Attorney for Respondents